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LEGAL POLYCENTRISM: A CHRISTIAN THEOLOGICAL AND JURISPRUDENTIAL EVALUATION

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ABSTRACT

Legal theorists have long debated whether law originates from a single source (the actions of state officials) or from multiple sources (including the innumerable communities and associations that constitute broader civil society). In recent years, proponents have defended polycentrism—and its critics have tried to refute it—from various moral, economic, and historical angles. But no contemporary writer has examined polycentrism from a Christian perspective. In the absence of such a study heretofore, this article attempts to evaluate legal polycentrism from a Christian theological and jurisprudential perspective. The Christian scriptures and Christian theology do not directly address whether law is polycentric or monocentric. Nevertheless, appealing to a number of biblical-theological issues—including the image of God, the Noahic covenant (Genesis 8:21–9:17), wisdom, and the purpose of civil government—I argue that Christians have good reason to regard polycentrism as a more satisfactory view of law.

KEYWORDS: polycentrism, legal positivism, customary law, Christian jurisprudence, law and theology

New Testament texts such as Romans 13:1–7 and 1 Peter 2:13–17 teach Christians to honor and submit to civil authority. Christian legal and political thought, accordingly, has debated whether and when resistance to unjust laws is permissible. But a more basic—although not unrelated—question is which norms of conduct are to be considered law in the first place.

The question is relevant for judges, of course, but it can also confront ordinary people in the mundane course of life. One might imagine a person who moves into a rural ranching community. In addition to the internal challenges of running her own ranch, she soon discovers many potential areas of conflict with her neighbors, such as maintaining boundary fences and dealing with animals that wander onto others' property and onto roads with automobile traffic. As these issues arise and she tries to deal with them collegially, she begins to realize that statutory provisions and state courts play little role in how her neighbors resolve their conflicts. They settle almost all of their disputes privately, and do so according to their own unwritten set of rules.[1] What is this person to do if she wishes to be a law-abiding citizen? Is she to think of *the law* governing her relations with her neighbors only in terms of rules, regulations, and decisions deriving from governmental bodies

1 I base this scenario on real-life ranching communities examined in Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991).

or also—and perhaps even primarily—in terms of the unwritten norms and procedures for dispute-resolution that in fact order many aspects of her new community's life?

In many diverse areas, people's actual conduct is under-determined by, and sometimes even in tension with, official state sources of law. In addition to the fact-based scenario recounted above, examples include how fast people drive, purchase and use of narcotics,[2] and response to the presence of undocumented persons in a society. Such examples raise the question whether law is a *monocentric* or a *polycentric* phenomenon. That is, does law originate from a single source (the actions of state officials) or from multiple sources (including the innumerable associations and institutions that constitute broader civil society)? To put it another way, is law a top-down phenomenon or is it also, and perhaps even primarily, a bottom-up phenomenon?

Although "the very idea that the law might not be identical with legislation seems odd both to students of law and to laymen,"[3] a number of scholars of law and related disciplines have defended versions of polycentrism in recent decades.[4] Legal polycentrism is not the province of any particular political ideology. Its proponents (only some of whom use the term "polycentrism") include classical liberals,[5] members of the "radical-left,"[6] anarchists (or something close),[7] and prominent scholars who reveal no clear ideological commitments in their relevant writings.[8] These proponents have defended polycentrism—and its critics have tried to refute it—from various moral, economic, and historical angles. To my knowledge, however, no contemporary writer has examined polycentrism from a Christian theological perspective. Yet there are good reasons for doing so. On a practical level, traditional Christian moral teaching holds that Christians are ordinarily obligated to obey properly constituted legal authorities, and thus all Christians, and especially those who are lawyers or pursue other vocations within the legal system, have great interest in knowing what the law truly is. On a theoretical level, the recent renaissance of Christian legal scholarship should provide interest and resources for such an inquiry.[9]

2 Other kinds of so-called morals legislation provide additional examples. See Lon L. Fuller, *The Principles of Social Order: Selected Essays of Lon L Fuller*, rev. ed., ed. Kenneth I. Winston (1981; Oxford: Hart Publishing, 2001), 252–53.

3 Bruno Leoni, *Freedom and the Law*, 3rd ed. (Indianapolis: Liberty Fund, 1991), 5; see also David J. Bederman, *Custom as a Source of Law* (New York: Cambridge University Press, 2010), ix–x.

4 For an overview of some of the relevant literature, see Tom W. Bell, "Polycentric Law," *Humane Studies Review* 7, no. 1 (1992): 1–10.

5 For example, Friedrich A. Hayek, *Law, Legislation and Liberty*, vol. 1, *Rules and Order* (Chicago: University of Chicago Press, 1973); Leoni, *Freedom and the Law*; Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law*, 2nd ed. (New York: Oxford University Press, 2014).

6 For example, Robert M. Cover, "The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative," *Harvard Law Review* 97, no. 4 (1983): 4–68. On Cover's politics, see Franklin G. Snyder, "Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law," *William and Mary Law Review* 40, no. 5 (1999): 1623–1729, at 1627.

7 For example, David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism*, 2nd ed. (La Salle: Open Court, 1989); Bruce L. Benson, *The Enterprise of Law: Justice without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990); John Hasnas, "The Obviousness of Anarchy," in *Anarchism/Minarchism: Is a Government Part of a Free Country?*, ed. Roderick T. Long and Tibor R. Machan (New York: Routledge, 2008), 111–31.

8 For example, Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1964); Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983); Ellickson, *Order without Law*; James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998); Bederman, *Custom as a Source of Law*.

9 See, for example, Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella, eds., *Christian Perspectives on Legal Thought* (New Haven: Yale University Press, 2001); and the comments by John Witte, Jr.,

In the absence of such a study heretofore, this article attempts to evaluate legal polycentrism from a Christian theological and jurisprudential perspective. For the sake of clarity and uniformity, I use the following four terms: First, *state sources* will refer to various acts of government that seek to regulate conduct, such as legislation, administrative regulations, and judicial decisions. Second, *non-state sources* will refer to various acts of private actors or voluntary associations that aim to regulate relations among the parties involved. Third, I refer to the *customary order* as the patterns of conduct to which members of a society ordinarily adhere as a matter of fact. And fourth, *law* will refer to the norms of conduct regarded as obligatory in the sense that society regards penalties and/or remedies as due if these norms are violated.

The Christian scriptures and Christian theology do not directly address whether law is polycentric or monocentric. Nevertheless, appealing to a number of biblical-theological issues—including the image of God, the Noahic covenant (Genesis 8:21–9:17), wisdom, and the purpose of civil government—I argue that Christians have good reason to regard polycentrism as a more satisfactory view of law. This conclusion has precedent in the history of Christian thought. Thomas Aquinas defended polycentric views in the midst of his most comprehensive theological work,[10] and later Thomistic scholars such as Francisco Suárez followed suit.[11] Johannes Althusius (1557–1638) and Abraham Kuyper (1837–1920), important social thinkers in my own Reformed tradition, also espoused polycentric ideas.[12] To make my case, I first offer some preliminary discussion of the issues on the table and then identify pertinent biblical-theological ideas and their theological-jurisprudential implications. I conclude by reflecting on how the preceding analysis might shape how we determine what is truly the law in cases in which state sources and the customary order conflict.

WHAT IS THE LAW? MONOCENTRIST AND POLYCENTRIST OPTIONS

Before I evaluate polycentrism, it will be helpful to describe monocentric and polycentric visions of law in more detail. The school of legal *positivism* has provided some of the most popular and influential definitions of law in recent centuries, and it provides an excellent example of a monocentric legal perspective.[13]

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in the foreword to *Law and the Bible: Justice, Mercy and Legal Institutions*, ed. Robert F. Cochran, Jr., and David VanDrunen (Downers Grove: IVP Academic, 2013), 8–9.

10 As discussed below, see especially Thomas Aquinas, *Summa Theologiae* 1a2ae 95.3; 97.3.

11 See Book 7 of Francisco Suárez's *Tractatus de legibus, ac Deo legislatore in decem libros distributes* (Lyon: Horatij Cardon, 1613).

12 For Althusius, the political commonwealth is composed of smaller associations. Each association has its own particular purpose, arising out of the various needs of human life. Their existence and structure depend upon the voluntary, covenantal consent of their members. See Althusius, *Politica*, ed. and trans. Frederick S. Carney (Indianapolis: Liberty Fund, 1995). Kuyper contrasted the "mechanical" power of the state with the "organic" and "spontaneous" character of the various non-governmental spheres of life, such as family, business, and science. For Kuyper, the latter do not owe their existence to the state, and the state ought not to impose its own laws upon them but respect the innate laws of each. See especially Abraham Kuyper, *Lectures on Calvinism* (Grand Rapids: William B. Eerdmans, 1931), lecture 3.

13 Another important jurisprudential school, legal realism, is also monocentric in its identification of law as what courts say it is. See, for example, Jerome Frank, *Law and the Modern Mind* (New York: Brentano's Publishers, 1930), 46:

> We may now venture a rough definition of law from the point of view of the average man: For any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts

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Positivists envision law as a set of commands imposed by political authorities upon members of society. The authorities that issue law may be morally obligated to decree what is just, but their decrees are "law" regardless of the good or evil they accomplish. As the nineteenth-century positivist John Austin put it, law is "set by political superiors to political inferiors;" it is a "rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[14] Every law is a command.[15] Broadly speaking, therefore, "law" is simply and strictly the "aggregate of the rules thus established."[16] The sovereign power is legally free to abridge subjects' political liberty at its own pleasure, although doing so may be contrary to positive morality and the law of God.[17] Similarly, twentieth-century positivist Hans Kelsen emphasized that his "pure theory of law" identifies what the law *is*, not what it *ought* to be.[18] Law represents "*coercive orders*,"[19] and such orders command "specific acts or omission of acts."[20] This classic positivist vision is thus monocentric because, to use terms identified above, law emanates only from state sources.

In contrast, polycentrism holds that there are multiple sources of law, of which state sources are (at most) one, and perhaps not even the most important. Polycentrists do not share a common definition of law, but they all reject conceptions of law as the sum of commands from political superiors to inferiors in favor of law as a complex normative order or system, or patterns of conduct, or an ordering principle.[21] Polycentrism has some affinities with classical natural-law theory, the vision of law ordinarily contrasted with positivism, but it is important to note that none of the

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so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what a court will decide.

14 John Austin, *The Province of Jurisprudence Determined*, 5th ed., ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995), 18.

15 Ibid., 21.

16 Ibid., 19. See also Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789; New York: Hafner, 1948), 324 ("Now *law*, or *the law*, taken indefinitely, is an abstract and collective term; which, when it means any thing, can mean neither more nor less than the sum total of a number of individual laws taken together.").

17 Austin, *The Province of Jurisprudence*, 223.

18 Hans Kelsen, *Pure Theory of Law*, 2d ed., trans. Max Knight (Berkeley: University of California Press, 1967), 1, 48.

19 Ibid., 33.

20 Ibid., 43.

21 Perhaps most eloquently captured by Berman in *Law and Revolution*: "Law in action involves legal institutions and procedures, legal values, and legal concepts and ways of thought, as well as legal rules. It involves what is sometimes called 'the legal process.'" Berman, *Law and Revolution*, 4. Law "is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation." Ibid., 5. "To speak of the Western legal tradition is to postulate a concept of law, not as a body of rules, but as a process, an enterprise, in which rules have meaning only in the context of institutions and procedures, values, and ways of thought. From this broader perspective the sources of law include not only the will of the lawmaker but also the reason and conscience of the community and its customs and usages." Ibid., 11. See also Fuller, *The Morality of Law*, 74, 145; Benson, *The Enterprise of Law*, 11; Hayek, *Rules and Order*, 36. Although I do not treat him as a polycentrist for purposes of this article, Neil MacCormick's notion of law as "institutional normative order" seems to express an idea many polycentrists would share. He writes that law has an "aspiration to order" by prescribing "an elaborate set of patterns for human conduct," and the orderliness depends upon "the set of patterns amounting to a rationally intelligible totality." See MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), 1, 11.

recent prominent proponents of polycentrism are natural lawyers in a classical sense and that some natural lawyers are monocentric in outlook.[22]

What are the non-state sources of law, according to these polycentrists? Among the most fecund sources are voluntary associations—"labor unions, professional associations, clubs, churches, and universities"—insofar as they create many norms guiding daily behavior.[23] A second example are contracts that private parties enter voluntarily in the course of ordinary relationships, which create enforceable rights and duties.[24] Another example is how participants in various fields of commercial enterprise develop common practices that define how they do business.[25] In general, whatever non-state norms shape the understanding and interpretation of law are alternative sources of legal obligation.[26]

Polycentrists recognize not only multiple sources of law but also multiple means for enforcing law. They point especially to the widespread use of mediation and arbitration to resolve disputes outside of civil courts.[27] They also note how certain communities develop cooperative, self-help measures that bypass state-controlled judicial procedures.[28] As Robert Ellickson puts it, the idea that "governments monopolize the control of misconduct" is "utterly false," a "blunder that dates back at least to Thomas Hobbes."[29]

As these examples demonstrate, polycentrists do not simply assert that there ought to be multiple sources of law but claim that there are in fact multiple sources. Many of them have argued that the Western legal tradition is polycentric to the core. In his magisterial study of the origins of the modern Western legal tradition in the Middles Ages, Harold Berman comments:

> Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems. . . . The conventional concept of law as a body of rules derived from statutes and court decisions—reflecting a theory of the ultimate source of law in the will of the lawmaker ("the state")—is wholly inadequate to support a study of a transnational legal culture. . . . From this broader perspective the sources of law include not only the will of the lawmaker but also the reason and conscience of the community and its customs and usages. . . . In the formative era of the Western legal tradition there was not nearly so much legislation or so much precedent as there came to be in later centuries. The bulk of law was derived from custom, which was viewed in the light of equity (defined as reason and conscience). It is necessary to recognize that custom and equity are as much law as statutes and decisions, if the story of the Western legal tradition is to be followed and accepted.[30]

22 For a good example of how two famous natural lawyers can go in different directions, see the comparison of Thomas Aquinas and Francisco Suárez in chapter 2 of James Bernard Murphy, *The Philosophy of Customary Law* (Oxford: Oxford University Press, 2014).

23 The quotation is from Fuller, *The Principles of Social Order*, 232; see also Fuller, *The Morality of Law*, 123–25. See generally Cover, "*Nomos* and Narrative."

24 See Fuller, *Principles of Social Order*, 188–205, 244–48; Benson, *The Enterprise of Law*, 227.

25 See Benson, *The Enterprise of Law*, 230.

26 According to Bederman: "Customary regimes flourish . . . in pluralistic legal environments" and in legal cultures "accepting of multiple sources of legal obligation." Bederman, *Custom as a Source of Law*, 177, 180. This again stands in contrast to positivism. Fuller claimed that positivists have never been comfortable with customary law. See *The Morality of Law*, 232–33. This is evident in both Austin and Kelsen, who believe that customary "law" really becomes law only when authorized by courts or the legislature, thereby making it the command of the sovereign. See Austin, *The Province of Jurisprudence*, 34–36; Kelsen, *Pure Theory*, 9.

27 See, for example, Benson, *The Enterprise of Law*, 213–16, 228; Hasnas, "The Obviousness of Anarchy," 120–22; Leoni, *Freedom and the Law*, 175.

28 A central concern of Ellickson, *Order without Law*.

29 Ibid., 4.

30 Berman, *Law and Revolution*, 10–11.

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Some polycentrists have pointed to old Roman law and English common law notions that governmental institutions exist more to discover and recognize the law than to make it.[31] Others have admired the ability of various medieval societies to make and enforce law effectively with little or no centralized political authority.[32] For example, several polycentrists have studied the medieval development of the *lex mercatoria*, a transnational body of norms and courts that merchants developed and administered for themselves across European borders.[33] Many centuries later, high-seas whalers, working far outside the bounds of any political society, formed detailed but unwritten rules regulating how competing ships hunted and claimed whales.[34] In the case of both the Law Merchant and the whalers, many civil courts came to recognize these privately developed rules.[35]

Among more recent examples, several polycentrist writers discuss how the Uniform Commercial Code, widely adopted by the American states, explicitly grants binding force to customary commercial practice.[36] Quite fascinating is Ellickson's study of ranching communities in Shasta County, California, in the 1980s, which largely governed themselves through unwritten norms and dispute-resolution procedures often at variance with statutory provisions (as described in this article's introduction).[37] The building and development of Brasilia provides another pertinent example. According to James C. Scott, an unplanned Brasilia grew up spontaneously around the carefully planned official city, and the former needed and was sustained by the latter, in a symbiotic relationship.[38] Based on this and several other cases, Scott concludes that every formal organization depends upon "implicit understandings, tacit coordinations, and practical mutualities that could never be successfully captured in a written code" and that "all socially engineered systems of formal order are in fact subsystems of a larger system on which they are ultimately dependent, not to say parasitic."[39] According to David Bederman, "[c]ustom continues to permeate almost all realms of contemporary law" and remains a mechanism for "bottom-up" lawmaking.[40]

To summarize much of the preceding discussion: First, advocates of polycentrism believe that law—understood as an ordering principle or as normative patterns of conduct—originates from a multiplicity of sources and not simply from state sources. A host of human communities are

31 See, for example, Hayek, *Rules and Order*, 82–83; Leoni, *Freedom and the Law*, 140–41. As Sir Edward Coke (1552–1634) described it, "The Lawes of England consist of three parts, The Common Law, Customes, & acts of parliament." See *The Selected Writings of Sir Edward Coke*, vol. 1, ed. Steve Sheppard (Indianapolis: Liberty Fund, 2003), 95.

32 For example, on the Anglo-Saxon law prior to the Norman invasion, see Benson, *The Enterprise of Law*, 21–30, or on early Icelandic law, see Friedman, *The Machinery of Freedom*, 201–8.

33 See, for example, Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton: Fred B. Rothman & Co., 1983), 7–21; Berman, *Law and Revolution*, chapter 11; Benson, *The Enterprise of Law*, 30–35. Some recent scholars have critiqued various aspects of the just-cited writers' claims. Emily Kadens, for example, argues that the merchant rules that were universal across borders usually came from contract or statute and that the existing commercial customs were primarily local. See Kadens, "The Myth of the Customary Law Merchant," *Texas Law Review* 90, no. 5 (2012): 1153–206. Kadens, however, does not challenge the importance of custom for the Law Merchant generally.

34 See Ellickson, *Order without Law*, 191–205.

35 Regarding the Law Merchant, see William Blackstone, *Commentaries on the Laws of England*, 4 vols. (1765–1769; Chicago: University of Chicago Press, 1979), 1.264; Trakman, *The Law Merchant*, 23–37; Benson, *The Enterprise of Law*, 60–61. Regarding the whalers, see Ellickson, *Order without Law*, 192.

36 Bederman, *Custom as a Source of Law*, 84–88; Fuller, *The Morality of Law*, 234; Ellickson, *Order without Law*, 254; Benson, *The Enterprise of Law*, 227.

37 See generally Ellickson, *Order without Law*, part 1.

38 Scott, *Seeing Like a State*, 118–30.

39 Ibid., 255–56, 351.

40 Bederman, *Custom as a Source of Law*, 57, 176.

jurisgenerative, to borrow Robert Cover's terminology.[41] Second, according to polycentrism, many laws arise spontaneously, as the product of human action but not through deliberate decision or conscious intent. As F. A. Hayek put it, it is a "fiction that all law is the product of somebody's will."[42]

In many respects, it is indisputable that non-state actors create governing norms, often without intent or deliberation. Even positivist judges, after all, enforce private contracts, bylaws of voluntary associations, standard commercial practices, and the like. Positivists may counter that they enforce such things because the higher law of the political sovereign commands them to do so.[43] Yet polycentrists, observing the grand, bustling, complex customary order and how little of what transpires within it is the result of government mandates, understandably find it implausible when positivists insist that law represents coercive orders that instruct people to perform or refrain from specific acts.[44] They rightly wonder why "the rule of the intermediate group ... has been systematically marginalized in legal theory for the past few centuries."[45]

But dismissing crass versions of positivism still leaves deeper and more difficult questions. It is one thing for courts to recognize aspects of the customary order as law and to enforce them as such when they protect parties' reasonable expectations, fill gaps between statutes, and do not contradict any state sources. But what about when they lie in tension with the latter? Should courts and ordinary people, at least at times, consider aspects of the customary order to be law rather than state sources?

An affirmative answer, however controversial, has a place in the Western legal tradition. The greatest document in the Roman law tradition, Justinian's *Digest*, not only prescribes that where there is "no applicable written law ... the practice established by customs and usage" ought to be followed but also states: "statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace." According to this reasoning, enacted statutes become legally obligatory only after they receive popular confirmation. This implies that social customs enjoy a kind of veto power over official legislation, which the *Digest* explicitly asserts: "It is absolutely right to accept the point that statutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude."[46] Justinian's *Institutes* adds, "The laws of nature, which are observed by all nations alike, are established ... by divine providence, and remain ever fixed and immutable: but the municipal laws of each individual state are subject to frequent change, either by the tacit consent of the people, or by the subsequent enactment of another statute."[47]

Thomas Aquinas incorporated this perspective into his theological system. Writing in the wake of a revival of Roman law in Western Europe,[48] Aquinas followed Isidore of Seville's opinion that human law should be "according to the customs of the country."[49] Later Aquinas claimed that

41 See generally Cover, "*Nomos* and Narrative."

42 Hayek, *Rules and Order*, 28. See also Ellickson, *Order without Law*, 184; Snyder, "Nomos, Narrative, and Adjudication," 1630–31 (commenting on Cover).

43 See Austin, *The Province of Jurisprudence*, 34–36.

44 See Kelsen, *Pure Theory*, 33, 43.

45 Snyder, "Nomos, Narrative, and Adjudication," 1636–37. See also Berman, *Law and Revolution*, 38–39.

46 *The Digest of Justinian*, ed. Theodor Mommsen and Paul Krueger, trans. Alan Watson, vol. 1 (Philadelphia: University of Pennsylvania Press, 1985), 1.3.32.

47 *The Institutes of Justinian*, trans. J. B. Moyle, 5th ed. (Oxford: Clarendon Press, 1913), 1.2.11.

48 For a brief history of the rediscovery of the *Digest*, see Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 43–45.

49 Thomas Aquinas, *Summa Theologiae*, 1a2ae 95.3.

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human law, which proceeds "from the will of man, regulated by reason," can be manifest by both speech and action. Thus, not only by legislation but "by actions also, especially if they be repeated, so as to make a custom, law can be changed and expounded." He concludes: "Accordingly, custom has the force of a law, abolishes law, and is the interpreter of law."[50] When exercising this veto power over official legislation, custom "shows that the law is no longer useful."[51]

The Anglo-American legal tradition may not seem amenable to such a perspective, given the English idea of parliamentary sovereignty. Yet this tradition has always left much of the work of legal ordering to the common law, a body of law developed independently of legislative institutions. The relationship of the customary order and the common law is a complicated matter, but the former certainly did play a significant role in shaping the latter, although in changing ways over time.[52] In one of the most famous of all English judicial decisions, Dr. Bonham's Case (1610), Chief Justice Sir Edward Coke and the Court of Common Pleas ruled, "It appeareth in our Books, that in many Cases, the Common Law doth controll Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void."[53] This suggests that common law trumps parliamentary acts when justice and reason are on the former's side,[54] which was also Aquinas's opinion.[55] According to Bederman, "even today there may be situations where the conditions of statutory desuetude may be occasionally accepted by courts," although he admits it is difficult to find true examples.[56] The practice of jury nullification in the Anglo-American tradition seems to represent one contemporary way by which a groundswell of popular sentiment may veto official legislation.

With this background in hand, we are ready to begin a theological evaluation of polycentrism. We have seen, on the one hand, that monocentrists think of law in terms of state sources only; on the other hand, polycentrists believe that the law primarily resides in the customary order, which is shaped both by state and non-state sources. In the next section, I present several biblical-theological considerations that provide important background for considering the merits of polycentrism, and then in the following section I unpack some theological-jurisprudential implications suggesting that polycentrism is a more satisfactory view of law from a Christian perspective. Only then do I turn specifically to cases of conflict between state sources and the customary order.

50 Ibid., 1a2ae 97.3.

51 Ibid., 1a2ae 97.3, ad. 2. See generally David VanDrunen, *Law and Custom: The Thought of Thomas Aquinas and the Future of the Common Law* (New York: Peter Lang, 2003).

52 See especially Bederman, *Custom as a Source of Law*, chapter 3. See also Hasnas, "The Obviousness of Anarchy," 113–14, 116; R. H. Helmholz, *Natural Law in Court: A History of Legal Practice in Theory* (Cambridge, MA: Harvard University Press, 2015), 99.

53 Coke, *Selected Writings*, 1.275.

54 The discretionary power this seems to leave to judges is undoubtedly why many positivists find Dr. Bonham's case disturbing and even illegitimate. Antonin Scalia, for example, calls Dr. Bonham's case "not orthodoxy at all," "an extravagant assertion of judicial power," and "eccentric." See Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997), 129–30. For one polycentrist's interpretation of this case, see Fuller, *The Morality of Law*, 99–101.

55 In addition to the material quoted above, Aquinas explains in *Summa Theologiae*, 1a2ae 97.3, ad. 2 that if the reason for a legislated law's usefulness remains, "it is not the custom that prevails against the law, but the law that overcomes the custom."

56 Bederman, *Custom as a Source of Law*, 113, 178.

THE BIBLICAL-THEOLOGICAL BACKGROUND

In this section, I largely refrain from direct comment about polycentrism. My goal here is to unpack several biblical-theological themes—particularly the image of God, the Noahic covenant, wisdom, and the vocation of civil government—that are foundational for developing a conception of law. I directly explore the implication of these themes for an evaluation of polycentrism in the following section.

The Collaborative Human Cultural Calling

Christian theology holds that God created human beings in the divine image. This is the first thing the Hebrew Bible says about humanity: "Then God said, 'Let us make man in our image, after our likeness.' . . . So God created man in his own image, in the image of God he created him; male and female he created them" (1:26–27).[57] Even after describing the fall into sin, for which God placed human beings under a curse (3:16–19), Genesis continues to say that humans bear God's image (9:6). Thus, according to Scripture, God endowed humanity with the image of God in creation and it remains even in a fallen world.[58]

The broader Christian tradition has no universally accepted definition of the image of God. Western theology has often emphasized the rational and volitional faculties of the human soul as the primary locus of the image, although recent biblical scholarship on Genesis 1 has provided enriched resources for theological reflection.[59] Drawing on this newer literature, although with respect for older ideas, I highlight two aspects of biblical teaching on the image of God important for our consideration of polycentrism. First, creation in the image of God entails a commission to engage in creative activity. God created human beings in his image *so that* they might "have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing" (Genesis 1:26),[60] a commission elaborated two verses later: "Be fruitful and multiply and fill the earth and subdue it and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth" (Genesis 1:28)—a call to benevolent rather than exploitative rule over the rest of creation. Second, Scripture ascribes the image of God to all people indiscriminately, including both male and female. The image of God entails ruling authority, but an authority shared by all alike, without elevating anyone inherently over another.

Does the image continue to entail this commission even after primordial humanity failed its image-of-God commission (Genesis 3)? The post-diluvian covenant with Noah (8:21–9:17) suggests a qualified positive answer.[61] The account of this covenant refers to human beings as divine

57 Translations from scripture are from The Holy Bible, English Standard Version (Wheaton: Good News Publishers, 2001).

58 This is a common Christian conviction, embraced widely in the Reformed, Roman Catholic, and Eastern Orthodox traditions (although the latter two also claim that sinful humans have lost the likeness of God, while the image remains). The Lutheran tradition ordinarily asserts that humans lost the image at the Fall.

59 I think especially of the now broadly accepted idea that the image entails exercising royal rule as God's earthly representative. See discussion of this, with an eye to its legal implications, in David VanDrunen, *Divine Covenants and Moral Order: A Biblical Theology of Natural Law* (Grand Rapids: William B. Eerdmans, 2014), 41–68.

60 See Paul Joüon, *A Grammar of Biblical Hebrew*, vol. 2, trans. and rev. T. Muraoka (Rome: Editrice Pontificio Instituto Biblico, 1991), 381.

61 For arguments that the whole of Genesis 8:21–9:17 should be understood as recounting the Noahic covenant, even though the "covenant" terminology only appears in 9:8–17, see Stephen D. Mason, "Another Flood? Genesis 9

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image-bearers (9:6) and includes moral exhortation (9:1–7). This exhortation twice repeats the command from Genesis 1:28 that human beings are to be fruitful, multiply, and fill the earth (9:1, 7). Although it does not repeat the commands about exercising dominion or subduing the other creatures, it does address human rule by regulating human treatment of animals (9:3–4) and by delegating authority to the human race to administer justice (9:6). Thus, I conclude that the image of God continues to entail the original commission of Genesis 1:26–28, but in a refracted form suitable for a fallen world.

The Noahic covenant has a programmatic character.[62] The preceding texts describe God sending the great flood as a radical judgment upon the corrupt human race (Genesis 6–7) and then undertaking a re-creation of the world, in which Noah and his family constitute the origin of a new humanity (Genesis 8:1–20). God proceeds to make a covenant with the human community as a whole—Noah and all his progeny (9:8, 11–12, 15)—as well as with all living creatures (9:10, 12, 15–17), the earth (9:13), and even the broader natural order (8:22). God promises no forgiveness of sins or everlasting beatitude but simply the preservation of the world from another great flood (8:21; 9:11, 15), and this for only as long as "the earth remains" (8:22). This is a *universal* covenant of preservation, in force until the end of the present world.[63] In contrast, later biblical covenants are *particular*, setting aside a chosen people from within the human race for whom God does great works of salvation. The Noahic covenant is programmatic, therefore, insofar as it establishes the basic relationship of God with the human race in general, that is, with people *as image-bearing human beings* (rather than with people *as Israelites or Christians*, as in later biblical covenants). It establishes a moral commission for the whole human race as divine image-bearers.[64]

This Noahic commission, however, identifies general activities or ends for image-bearers to pursue, but provides no master plan for how to carry out these activities or to achieve their ends. The covenant is striking for the generality and minimalist character of its moral commission: multiply and fill the earth, eat plants and animals with proper restraint, and administer justice. Genesis 9:1–7 also provides no authorization for a select person or group of people to dictate a plan for carrying out this general commission. As we might expect, given the universal human endowment with the image in Genesis 1, the Noahic covenant puts all people on a level playing field when it comes to worth and dignity: the talionic logic of Genesis 9:6—"whoever sheds the blood of man,[65] by man shall his blood be shed"—is that the lives of any two human beings are of equivalent value.

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and Isaiah's Broken Eternal Covenant," *Journal for the Society of the Old Testament* 32, no. 2 (2007): 177–98, at 184–86.

62 I interpret this covenant along lines advocated by many in my own Reformed tradition. See, for example, Herman Witsius, *The Economy of the Covenants between God and Man: Comprehending a Complete Body of Divinity*, 2 vols., trans. William Crookshank (Phillipsburg: Presbyterian and Reformed, 1990), 2:239; Wilhelmus à Brakel, *The Christian's Reasonable Service*, 4 vols., trans. Bartel Elshout (Ligonier: Soli Deo Gloria, 1992–95), 4:384; Abraham Kuyper, *Common Grace* (Grand Rapids: Christian's Library Press, 2013), 1.1.15–117; Herman Bavinck, *Reformed Dogmatics*, vol. 3, *Sin and Salvation in Christ*, ed. John Bolt, trans. John Vriend (Grand Rapids: Baker Academic, 2006), 218–19; Geerhardus Vos, *Biblical Theology: Old and New Testaments* (Grand Rapids: William B. Eerdmans, 1948), 56, 62–63; VanDrunen, *Divine Covenants and Moral Order*, 100–14.

63 According to Jonathan Burnside, "It is impossible to imagine a more inclusive covenant than this." See Burnside, *God, Justice, and Society: Aspects of Law and Legality in the Bible* (Oxford: Oxford University Press, 2011), 35.

64 There are important similarities and differences between the moral implications I draw here from the Noahic covenant and the ancient Jewish tradition of the Noahide laws. See VanDrunen, *Divine Covenant and Moral Order*, 543–45. For a thorough study of the Noahide laws, see David Novak, *The Image of the Non-Jew in Judaism: An Historical and Constructive Study of the Noahide Laws* (Lewiston: Edwin Mellen Press, 1983).

65 The Hebrew term here translated *man* is a generic term for a human being and is not gender specific.

Thus, the Noahic covenant sets forth a general commission, but provides no concrete plan for achieving it and no governing body to create such a plan. How then was the human race to pursue its commission? At this point the inquiry requires some imagination, but I propose that the biblical account leaves it to human beings to pursue their commission through an experimental, collaborative effort in which each person honors every other as of equal worth and dignity. Accomplishing the three general tasks constituting the Noahic commission obviously requires the establishment of corporate associations: to multiply and fill the earth calls for familial institutions; to supply food for a growing population requires enterprise associations that promote hard work and technological development; and to administer justice demands judicial institutions for resolving disputes. People presumably must develop authority structures alongside these institutions to enable their effective operation; but since all people are of equal worth and dignity, these authority structures ought to develop organically and consensually, rather than as the coercive imposition of one person's will over another.

The Communal and Cumulative Acquisition of Knowledge

This idea that human beings are to pursue a divinely given commission through the organic and consensual development of various institutions and authority structures raises an important question: how can they pursue such a complex task with appropriate understanding, such that the institutions and authority structures they establish are productive, beneficial, and just? To answer this question, I introduce *wisdom*, another important biblical-theological theme. The Christian Scriptures present wisdom as essential for individuals and communities to gain understanding about how to live well in this world. More than any other biblical book, Proverbs abounds with instruction about how to grow in wisdom toward this end, and in so doing it pays special attention to matters of family, work, and justice that the Noahic covenant highlights. Thus, it is worth reflecting on how human beings develop wisdom, according to Proverbs. In what follows I assume that wisdom, in Proverbs, is not memorization of a list of clear-cut rules or the like, but a kind of perception of how the world operates and of what sort of behavior will be effective and appropriate in a concrete situation, in light of all relevant circumstances,[66] as well the skill to put this perception into practice.[67]

One way to summarize is that developing wisdom is a communal process.[68] That is, wisdom is acquired through participation in communities and is the work of a lifetime (on an individual level) and of generations (on a communal level). Individuals may begin developing wisdom already as children, as they pay attention to the instruction of their parents (Proverbs 1:8–9), who pass understanding down to them (22:6). As they grow older, individuals continue to learn wisdom by relying upon others. They seek insight from a multitude of advisors (15:20; 13:20) and modify their course when people rebuke or correct them (10:8; 12:15; 19:20). They also learn from others indirectly

66 See, for example, James L. Crenshaw, *Old Testament Wisdom: An Introduction* (Louisville: Westminster John Knox Press, 1998), 11; Roland E. Murphy, *The Tree of Life: An Exploration of Biblical Wisdom Literature*, 3rd ed. (Grand Rapids: William B. Eerdmans, 2002), 10–11.

67 See Raymond C. Van Leeuwen, *Proverbs*, The New Interpreter's Bible (Nashville: Abingdon Press, 1997), 53–54; Michael V. Fox, *Proverbs 1–9*, The Anchor Bible (New York: Doubleday, 2000), 179–80, 355–56; Katharine J. Dell, *The Book of Proverbs in Social and Theological Context* (Cambridge: Cambridge University Press, 2006), 142; David VanDrunen, "Learning the Natural Law as Maturation in Wisdom," *In die Skriflig/In Luce Verbi* 50, no.1 (2016): 1–9, at 4–7.

68 See VanDrunen, "Learning the Natural Law," 7–8.

through observation and reflection on the experiences of life.[69] Such people gain wisdom by pondering the sluggard, for example, whose property falls into ruin when he refuses to be industrious (24:30–34), and by pondering the foolish youth, who falls into deep trouble when seduced by a married woman (7:6–23). In this process, people constantly seek new insight that they incorporate into the body of knowledge learned previously, analogizing less clearly known things to things better understood.[70]

From Proverbial perspective, therefore, understanding how to live productively, beneficially, and justly in this world is acquired by a communal and cumulative process. As they heed instruction, seek counsel, observe others' conduct, and reflect upon the outcomes of different ways of life, people gain access to a treasury of wisdom that has been building from generation to generation. Much more knowledge resides in communities than any individual can ever absorb. Yet as their ancestors learned from their parents, refined what they inherited, and passed their understanding along, so also the wise do today, in hope of winning and transmitting some share of that cumulative insight.

The acquisition of wisdom is directly relevant for law. This was true for the Old Testament law. Although the Mosaic law claims to originate from God on Mount Sinai, it never suggests that Israelite life should be a mindless obedience to rules. For one thing, biblical law often takes narrative form, prescribing right conduct and proper remedies through cases studies rather than abstract precepts. Understanding how a particular dispute resembled the relevant case study (or not) and thus how to dispose of the dispute justly required sharp perception and good judgment.[71] Furthermore, the Old Testament law was incomplete, in the sense that it does not address many areas of human life and addresses others only briefly. In dealing with these areas, judges and ordinary people apparently needed to make wise use of other legal sources, such as customary law and common legal notions throughout the ancient Near Eastern world.[72] The Mosaic law did not provide exhaustive rules, but taught the people wisdom,[73] which they clearly needed to live under the law in life's concrete situations.

Reflecting on the fact that the Mosaic law was meant to teach wisdom draws one's mind also to Proverbs. This book indicates that wisdom is (or ought to be) crucial for the civil law of all nations, not just ancient Israel's. Proverbs not only speaks about the importance of wisdom for justice and civil authority on numerous occasions[74] but also claims that "*all* who govern justly" rule by wisdom (8:15–16).

The Role of the State

I turn finally to civil government, or the state. The Noahic covenant itself does not establish civil government. God delegates authority to administer justice against wrongdoers, but only in the

69 See, for example, Leo Perdue, *Wisdom and Creation: The Theology of Wisdom Literature* (Nashville: Abingdon Press, 1994), 109–10; Ronald E. Clements, *Wisdom in Theology* (Grand Rapids: William B. Eerdmans, 1992).

70 See, for example, Leo G. Perdue, *The Sword and the Stylus: An Introduction to Wisdom in the Age of Empires* (Grand Rapids: William B. Eerdmans, 2008), 11; Crenshaw, *Old Testament Wisdom*, 55; Clements, *Wisdom in Theology*, 45–46.

71 See, for example, Burnside, *God, Justice, and Society*, 11–12.

72 See, for example, ibid., 18–19. For a thorough recent study of the relation of the Mosaic law to other ancient Near Eastern Law, see David P. Wright, *Inventing God's Law: How the Covenant Code of the Bible Used and Revised the Laws of Hammurabi* (Oxford: Oxford University Press, 2009); see also Burnside, *God, Justice, and Society*, 2–10; VanDrunen, *Divine Covenants and Moral Order*, 288–301.

73 For a summary case, see Burnside, *God, Justice, and Society*, 19, 24–26.

74 See discussion of relevant texts in VanDrunen, *Divine Covenants and Moral Order*, 399–404.

most general terms: "by *man* shall his blood be shed" (Genesis 9:6). The Noahic covenant, therefore, leaves administration of justice to what I have called the experimental, collaborative, organic, and consensual process of developing institutions and authority structures. In the course of history, this process has obviously produced civil governments. But if this is the case, these civil governments are inevitably linked to the process. Government may even come to assert an important influence on the process of developing institutions and authority structures, but the process itself is more fundamental.[75] From the perspective of the foundational Noahic covenant, government is only legitimate insofar as developed by human beings pursuing a creative and collaborative commission in accord with their nature as divine image-bearers. Thus, the establishment of government does not entail destruction of this pursuit, which would be like trying to destroy the foundation once a house is built upon it. To put it another way, the formation of civil government does not entail suppression of the ongoing organic and consensual creation of a host of institutions and authority structures.

Biblical texts that speak directly about civil government suggest the truth of the previous claims extrapolated from the Noahic covenant. For example, the two most prominent New Testament texts on civil authority, Romans 13:1–7 and 1 Peter 2:13–17, do not institute civil government but merely confirm the authority of a government that already exists. They presuppose the long process of human pursuit of the Noahic commission that eventually, in a particular place and for a limited time, produced the government of Rome. Scripture nowhere, in fact, gives *de novo* authorization for an organization we call government or the state.

It is also worth noting that these New Testament texts do not recognize any monopolistic authority of government officials to make or enforce law. The magistrate "bear[s] the sword," according to Paul, but does so as "the servant of God, an avenger who carries out God's wrath on the wrongdoer" (Romans 13:4). A striking effect of the text is to humble boastful claims of political rulers and to place them firmly under an authority higher than themselves, with obligation to enforce an order of justice that transcends them. Romans 13 confirms the legitimacy of civil magistrates while simultaneously stripping them of pretentions to absolute power. A number of Old Testament texts press in the same direction. One of the more noble Gentile rulers in the Old Testament, King Abimelech of Gerar, makes a relatively good impression precisely because he recognizes that there are "things that ought not to be done" and feels constrained by a certain "fear of God" (Genesis 20:9, 11). Through the Old Testament prophets, furthermore, God held many Gentile nations accountable for heinous acts of injustice. In the powerful sequence of oracles in Amos 1:3–2:3, for example, God condemns several of Israel's neighbors for deeds such as slave-trading, treaty-breaking, ripping open pregnant women, and desecrating the dead. The prophet Daniel also witnessed the divine humiliation of the mighty Nebuchadnezzar when Nebuchadnezzar exalted himself, refused to acknowledge his divine overlord, and failed to exercise justice (Daniel 4).[76] In both Old and New Testaments, therefore, government officials bear an impressive authority—not autonomous authority to do what is right in their own eyes, however, but authority to enforce a justice that brings benefit to the people they serve and reflects the righteousness of God.

75 Consistent with these claims is the fact that the modern state in fact emerged rather late in history. See Scott, *Seeing Like a State*, 183–84; Hasnas, "The Obviousness of Anarchy," 122.

76 See discussion of these Old Testament examples in VanDrunen, *Divine Covenants and Moral Order*, 148–61, 167–78, 196–207.

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THEOLOGICAL-JURISPRUDENTIAL IMPLICATIONS

In the previous section I discussed several biblical-theological themes crucial for Christian reflection on law and public life. I now turn to explore their implications for the chief question before us: How should Christians evaluate the claims of legal polycentrism? To undertake this, I revisit these themes in the order considered above and put them into conversation with jurisprudential issues important to monocentric-polycentric debates. I argue that each of the biblical-theological themes offers reasons to think that polycentrism is a more satisfactory view of law.

Polycentrism and the Collaborative Human Calling

According to a biblical conception of the image of God, I argued above, human beings have a divine commission to pursue creative activity and to exercise a benevolent rule in this world. Furthermore, God has endowed all human beings with this image indiscriminately and equally. When God reaffirmed humanity's image-bearing status in the Noahic covenant, he neither provided a master plan for putting the commission into concrete practice nor installed certain individuals with a special privilege of creating and imposing such a plan. Instead, the Noahic covenant appears to leave the human race to pursue its task through an experimental and collaborative process in which all should have a share.

The formation of law and legal systems is part of this process. The development of familial institutions and enterprise associations requires social norms that regulate human activities and relationships, and the development of judicial institutions requires rules and procedures for dealing with violations of these norms. Thus, the question before us is whether a monocentric or polycentric conception better captures the idea that the formation of law ought to be a collaborative process that treats all people as participants in the image-bearing divine commission.

Considered in this light, there is a strong *prima facie* case for polycentrism. Insofar as it envisions a plethora of sources of law, many of which stem from the private and voluntary interactions among ordinary people, polycentrism makes law-formation a collaborative and inclusive process by definition. One might reply, from a monocentrist perspective, that holding state officials democratically accountable also captures the desired collaboration and inclusiveness. Nevertheless, while a robust democratic polity may indeed help a monocentric legal system to capture these concerns to some degree, I suggest that there are good reasons to conclude that polycentrism honors the goals of collaboration and inclusiveness much more satisfactorily. Two considerations invoked by polycentrists illustrate why this is the case.

Knowing the Law

The first consideration is that the law that ordinary people actually know—that is, the norms that in fact structure their lives and guide their expectations—is found in the customary order and not in state sources per se. State sources direct ordinary people's lives only insofar as these source's norms have been incorporated into the customary order, which many non-state sources have also shaped. Given this reality, to treat state sources alone as the law, along monocentric lines, is to make the law largely unknown to the mass of people it allegedly governs. And if ordinary people do not know the law, they can hardly be said to share in the process of law-formation in a collaborative and inclusive manner.

This basic argument draws upon common polycentrist concerns. Many polycentrists have emphasized that people should know the law that rules them, both for the stability of a legal

system[77] and for the dignity of the people themselves.[78] Yet it seems clear that most people know very little about what state sources say,[79] and it would be tedious, complicated, and expensive for them to try to find out. Perhaps this only bothers them slightly because they figure that the law that truly governs them is not found in state codes or court reports anyway.[80] Yet there is a real danger of being caught by an unknown rule lurking in one of these volumes. According to Harvey Silverglate, the average American professional unwittingly commits several federal crimes in the course of a typical day. For the most part, no harm follows, but it poses a lingering threat and makes the ordinary person vulnerable to unexpected, arbitrary, or vindictive action on the part of law enforcement.[81]

Polycentrists note that the customary order is what ordinary people actually do know, and what structures their lives.[82] People do not understand their communal obligations as a collection of rules they can name, but as patterns of expected and appropriate behavior. Our varied and complex legal materials "present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited. To inhabit a *nomos* is to know how to *live* in it."[83] Furthermore, knowledge of the customary order comes largely by perception and intuition, gained not by the study of books but by actually living in concrete communities, observing others' patterns of conduct, and making those patterns one's own as a kind of habit.[84] Since the customary order is what people actually know and expect others to follow, recognizing its norms as law protects ordinary expectations in ways that application of state sources alone cannot.[85] Although the polycentrists expressing these jurisprudential concerns do not put it in the biblical-theological terms discussed above, I suggest that their concerns capture the collaborative and inclusive character of law in ways that even a democratically accountable monocentric legal system cannot.

77 For example, Fuller argued that legal systems miscarry when they fail to publicize rules and to make them understandable, and that a virtue of the common law was how it worked out widely held conceptions. See Fuller, *The Morality of Law*, 39, 49–51, 63–65. See also Charles Murray, *By the People: Rebuilding Liberty without Permission* (New York: Crown Forum, 2015), 32–33.

78 For example, Thomas Aquinas explained that the reason behind a law resides both in the lawgiver and, by participation, in the one who receives the law to be ruled by it. See *Summa Theologiae*, 1a2ae 90.1 ad. 1; 90.3 ad.1; see also 90.4.

79 See MacCormick, *Institutions of Law*, 71.

80 See Ellickson, *Order without Law*, 144–47; see also Leoni *Freedom and the Law*, 177.

81 Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (New York: Encounter Books, 2011). How has this happened? "The answer lies in the very nature of modern federal criminal laws, which have become not only exceedingly numerous … and broad, but also … impossibly vague." Ibid., xxxvi. The recent federal action against the Gibson Guitar Corporation arguably provides a well-publicized case in point. For general background and analysis of this matter, see C. Jarrett Dieterle, "The Lacey Act: A Case Study in the Mechanics of Overcriminalization," *Georgetown Law Journal* 102, no. 4 (2014): 1279–306. The U. S. Fish and Wildlife Service sent armed federal agents to raid two Gibson Guitar buildings, to gather evidence that Gibson had violated an old and obscure U.S. statute, which, to be true, required Gibson to violate laws of India.

82 For similar argument, see Hasnas, "The Obviousness of Anarchy," 118–19. See also Scott, *Seeing Like a State*, 49 ("We must never assume that local practice conforms with state theory.").

83 Cover, "*Nomos* and Narrative," 6. See also Friedrich A. Hayek, *Law, Legislation and Liberty*, vol. 2, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), 11 ("What we have in common with our fellows is not so much a knowledge of the same particulars as a knowledge of some general and often very abstract features of a kind of environment.").

84 See Fuller, *The Morality of Law*, 51; MacCormick *Institutions of Law*, 66–67. See also Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (Chicago: University of Chicago Press, 1962).

85 Hayek comments in *Rules and Order*, 87: "The task of the [common law] judge will be to tell them what ought to have guided their expectations, not because anyone had told them before that this was the rule, but because this was the established custom which they ought to have known." See also *Rules and Order*, 97; Bederman, *Custom as a Source of Law*, 181.

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Interpreting the Law

The second consideration builds on the first. If the law is to be known by ordinary people, it must be coherent; that is, the law must have an integrated systematic consistency.[86] No one can understand a body of law that consists of a jumble of unrelated or even contradictory rules. But the coherence of law depends upon judicial interpretation of law being as uniform as possible. When judges interpret applicable rules in different ways, the law becomes inconsistent and unpredictable. And when ordinary people do not know how to interpret applicable rules in ways that match the interpretation of judges, they will not know how to live under those rules. The collaborative and inclusive nature of a legal system, therefore, demands that judges and ordinary people share some common way of interpreting the law.

If I am to clarify how this lends support to polycentrism, some background comments on *interpretation* are in order. No legal rule, even the most perfectly worded statute, is an island to itself whose meaning can be entirely determined from within. At the very least, statutes use words borrowed from an already existing language, and the ability to read and understand that language requires immersion in a universe of meaning. Languages emerge within specific cultural contexts and constantly develop in response to that culture's communication needs. Thus, reading a statute well inevitably depends upon understanding the culture in which it exists, with its convictions, biases, and assumptions.[87] But language changes, cultures change, and judges often do not share the same convictions, biases, and assumptions, with each other or with the drafters of the statute. To be useful, legal rules must be interpreted, and in a thousand ways this can be a daunting and controversial endeavor.

A central question for jurisprudence, therefore, is how to achieve relative uniformity, and thus coherence, in interpreting legal rules. What are the possible options and do any of them promise success?

In expounding his influential theory of "law as integrity," Ronald Dworkin is certainly correct that judges cannot completely separate themselves from their personal convictions, although he attempts to keep judges rooted in a broader tradition by making them participants in a narrative chain of judicial decisions. Yet the "political morality" that guides Dworkin's judges is ultimately each judge's own philosophy. His ideal judge—tellingly dubbed "Hercules"—has the ability to perceive the purest form of the law through his own political judgment.[88] This is not a recipe for achieving relative *uniformity* of interpretation, for judges inevitably disagree about political morality. Thus, Dworkin's "law as integrity" does not provide a background context that judges share in common.

What can serve as common background context? The legislature cannot simply decree one. A background context involves perspectives, biases, and assumptions. A context is a holistic universe that shapes the meaning of things within it. A legislature can promulgate rules but it can hardly generate a context.[89]

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86 On the ideal of coherence within the Western legal tradition, see Berman, *Law and Revolution*, 9, 11, 38. For related comments regarding the common law, see Coke, *Selected Writings*, 741; James R. Stoner, Jr., *Common-Law Liberty: Rethinking American Constitutionalism* (Lawrence: University Press of Kansas, 2003), 11; and Gordon S. Wood, "Comment," in *A Matter of Interpretation*, 59.

87 See Cover, "*Nomos* and Narrative," 4–5.

88 See generally Ronald Dworkin, *Law's Empire* (Cambridge, MA: The Belknap Press of Harvard University Press, 1986).

89 See Murphy, *The Philosophy of Customary Law*, x, 113–16; Hayek, *Rules and Order*, 65, 78; Cover, "*Nomos* and Narrative," 11–12; MacCormick, *Institutions of Law*, 5, 31, 42–44; Pound, *The Ideal Element*, 74, 82–87, 117–19, 139.

A more promising option is to find a common background context not in legislative decree but in a wisdom internal to the judiciary. Many jurists have found such a wisdom in the common-law tradition. Coke wrote of the "artificial reason" of the common law, distinct from pure natural reason. Jurists gain it through long experience, by which they make the law's reason their own.[90] In Coke's vision the experienced judge gains learning and judgment and attains mastery in an art.[91] According to James Stoner, common law judges were trained in Aristotelian practical wisdom.[92] Similarly, Karl Llewellyn described common-law appellate judging as a kind of craftsmanship, an inexact science requiring "horse sense."[93] Over against legal realists' skeptical challenges to this tradition,[94] Roscoe Pound defended the ability of common law wisdom to build objectivity and impartiality in the judges who embraced it.[95]

If it exists, such a shared judicial wisdom approaches what we seek, a common background context for legal interpretation. But there is still reason to doubt its adequacy. As internal to the judiciary, this wisdom risks becoming esoteric, self-referential, and isolated from the real world whose disputes it adjudicates. It acculturates judges into a craft and art that is, by definition, inaccessible to the non-judge.[96] Thus, if law is to be accessible to ordinary people, internal judicial wisdom in Coke's sense is not a sufficient common background context for interpretation.

What seems necessary is that the internal judicial wisdom correspond as much as possible to the wisdom internal to the customary order. The development of an *artificial reason* and distinctive *horse sense* among the legal profession through uniform practices of acculturation can undoubtedly promote relative uniformity of interpretation of laws, but there needs to be a reciprocity between them and the *common reason* and *common sense* of the broader society.[97] The legal profession, and judges in particular, ought to keep their lawyer-like thinking tethered to the way they think as ordinary participants in their communities and open to testimony about the assumptions and practices of the customary order.

In short, the coherence of law, and hence the ability of ordinary people to know it, requires that judges, like the people whose disputes they adjudicate, regard the customary order as part of the legal fabric. When judges interpret even state sources against the background of the customary order (shaped in large part by non-state sources), their decisions become accessible to ordinary people in ways difficult to achieve otherwise. Thus, here is another reason why polycentrism promotes the biblical-theological ideal that law develop through a collaborative and inclusive process.

Polycentrism and the Acquisition of Knowledge

The second part of the biblical-theological discussion above argued that, if the human race is to develop law that is beneficial and just, it must acquire knowledge in the proper way. Drawing upon Proverbs, I suggested that this entails growth in wisdom, and that individuals and communities grow in wisdom through a communal and cumulative process in which one generation imparts

90 See, for example, Coke, *Selected Writings*, 481, 701, 742–43.
91 See Stoner, *Common-Law Liberty*, 11–12.
92 Ibid., 7, 23.
93 See Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co., 1960), 213–16 (on craftsmanship); 190, 213–16, 382 (on inexactitude); and 5, 19, 21, 53, 60–61, 202–3, 264, 268–70 (on horse sense).
94 For a classic example, see Frank, *Law and the Modern Mind*.
95 See, for example, Pound, *The Ideal Element*, 268–69, 286, 291, 297–98, 305.
96 See related comments in Bederman, *Custom as a Source of Law*, 28–30.
97 See Murphy, *The Philosophy of Customary Law*, 115–16.

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an inheritance of understanding to the next generation, which must imbibe, cultivate, and refine this inheritance. Here I argue that a polycentric conception of law is able to capture these concerns in ways that a monocentric conception is not. To establish this part of my argument, I turn again to a couple of common concerns among polycentrists.

The Information Problem

If the development of just law requires wisdom, and wisdom requires taking all relevant facts and circumstances into account, what facts and circumstances are relevant for a legal system? A staggering number. Modern societies are complex almost beyond imagination, involving interaction among hundreds of millions of individuals in hundreds of thousands of associations undertaking a bewildering array of activities. The wisdom required to make just law for such societies must account for a vast amount of information. As many of its proponents have appreciated, polycentrism is able to account for this predicament in ways that monocentrism is not.

The difficulty for monocentrism is that the information required for the smooth operation of complex modern societies is scattered among a host of individuals and associations, such that each agent knows only a miniscule fraction of the whole.[98] Furthermore, the content of this aggregated knowledge and the relation of its pieces to one another is constantly in flux. This means that while legislative activity can influence the shape of a complex modern society, legislators seeking to control it or even to achieve some particular change are bound to be disappointed. Legislators and other state officials have such a small degree of the pertinent information at hand that, even if they carry out their mandates meticulously, the complexity of society makes it impossible to predict all the results of legislation with any kind of precision.[99] Legislative attempts to attain someone's social vision are at best an educated guess and often a shot in the dark. Totalitarian regimes are clearly capable of wreaking much harm through their legislation, but they inevitably confront much that is out of their control.[100] Even Western liberal democratic governments, with more modest goals, constantly find that unknown circumstances and unforeseen events stymie their seemingly reasonable aspirations.[101]

The development of the customary order does not face this same information problem. The customary order—constituted by the patterns of conduct resident in the overlapping real-life relationships among millions of individuals and associations—is the product of the spontaneous coordination of the tiny bits of relevant knowledge possessed by all the participants of complex modern societies.[102] Thus, while legislation is promulgated by those ignorant of most of the

98 See especially the work of Hayek, for example, *Rules and Order*, 12–13, 32. See also Barnett, *The Structure of Liberty*, chapter 2.

99 According to Scott, "trying to jell a social world … seems rather like trying to manage a whirlwind;" societies are an "ineffably complex web of activity" and trying to replace this web with formal rules is "certain to disrupt the web in ways that they cannot possible foresee." Scott, *Seeing Like a State*, 92–93, 256. See also Hayek, *The Mirage of Social Justice*, chap. 7; Leoni, *Freedom and the Law*, 7; Benson, *The Enterprise of Law*, 131.

100 Scott comments that the Soviet experiment in agricultural collectivization, whose planners were "flying blind," endured as long as it did because of "the improvisations, gray markets, bartering, and ingenuity that partly compensated for its failures." Scott, *Seeing Like a State*, 202, 203.

101 See, for example, Matt Ridley, *The Evolution of Everything: How New Ideas Emerge* (New York: Harper, 2015), particularly chapters 5–6, 13, 15. Central bankers' repeatedly failed attempts to bring about desired economic outcomes provide good contemporary examples. See, for example, Sebastian Mallaby, *The Man Who Knew: The Life and Times of Alan Greenspan* (New York: Penguin, 2016).

102 See Hayek, *Rules and Order*, 38, 41, 44, 50–51, 63; Barnett, *The Structure of Liberty*, chapter 3. On Hayek's contribution to explaining the "knowledge problem," see Bruce Caldwell, *Hayek's Challenge: An Intellectual Biography of F. A. Hayek* (Chicago: University of Chicago Press, 2004), 338.

relevant information, the customary order emerges precisely through the spontaneous process that integrates dispersed information into a harmonious social system.

This does not mean that legislation and other state sources have no place at all, although it should instill civil officials with a sense of often-missing modesty.[103] It does suggest that discovering the law partially in the customary order, as shaped by a multiplicity of sources, enables a legal system to harness the information necessary to do justice. Thus a polycentric legal system, in this sense at least, reflects the way of wisdom.

Change in the Law

Inherent in the preceding discussion, but worth brief comment in its own right, is that law is not established once and for all, but constantly changes. On the one hand, law must change if it is to be, as Aquinas echoed Isidore, "suitable to place and time."[104] On the other hand, legal change has potentially undesirable consequences. People need to plan for the future. Developing skills, investing resources, and many other activities necessary for individual and social flourishing require predicting, with some degree of confidence, what coming months and years will bring. But the future, and thus predictions about it, are always uncertain. One helpful service law can provide is a degree of stability as people anticipate an uncertain future. Although much remains unpredictable, it is advantageous to know that one will be playing by the same basic set of rules—just as an athlete, unable to plan for the exact circumstances in the fourth quarter of tomorrow's game, can still train intelligently knowing that the rules of the game will be the same as today. The prospect of legal change exacerbates uncertainty and detracts from ordinary people's ability to plan intelligently for the future.[105] Here I suggest that polycentrism, by promoting acquisition of knowledge in ways that reflect the biblical-theological considerations above, enables law to change in ways that mitigate some of these concerns.

According to Proverbs, useful knowledge is acquired through a generation-spanning process that inherits a treasury of wisdom from the past and incorporates new insights into it. For law to reflect this process, it must retain the hard-earned gains of the past while refining them for the future. This indicates that beneficial legal change will generally be *gradual* and *incremental*. If law changes in this way, it should mitigate problems that arise when the future of law seems uncertain and people cannot plan for days to come or rely on legitimate expectations.

It seems fair to say, however, that changing the law through legislation or other state sources tends not to be gradual and incremental, but *abrupt* and *drastic*. For one thing, legislation is a punctiliar act and thus is by nature abrupt. The law at one moment prescribes one thing, and then, at the moment of legislative enactment, the law becomes something else. Legislation is also at least potentially drastic. Legislators can attempt to tweak the law through small modifications, but faced with responsibilities to supervise the whole complex body of law and the pressures of competing factions and special interests, bold proposals are most likely to garner attention and seem worth the time. In these respects, at least, legislation has serious drawbacks as a mechanism for changing the law.[106]

The customary order, in contrast, tends to change gradually, incrementally, and "fluidly."[107] The inertia of known and expected patterns of behavior creates barriers to changes in custom

103 See Ellickson, *Order without Law*, 281–83; Scott, *Seeing Like a State*, 345; Hayek, *Rules and Order*, 33, 59.

104 Thomas Aquinas, *Summa Theologiae*, 1a2a 95.3.

105 Thus, according to Fuller, a legal system can miscarry through frequent change. See Fuller, *The Morality of Law*, 79–81.

106 See Leoni, *Freedom and the Law*, 9–10, 70–75, 78–79, 80–81, 90, 110.

107 For the latter term, see Bederman, *Custom as a Source of Law*, 177–78.

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other than those that occur by small steps over periods of time, perhaps even imperceptibly to most people as they happen. Yet it is inevitable that such gradual and incremental change will occur, for patterns of expected conduct necessarily shift as people are born and die, associations rise and fall, and industry and technology develop. Customary development of law is a "living process," and the "plasticity" of customary systems can be a source of "microadjustments."[108] The customary order changes in ways analogous to change in language, markets, and science.[109] Thus, spontaneous legal change through the customary order has advantages in two directions over legal change through state sources. In the latter, laws either do not change at all or they change abruptly and perhaps drastically, while through the customary order law inevitably changes, but tends to do so gradually and incrementally.[110]

Changing the law through state sources may well be desirable in various circumstances. But if the customary order indeed changes in gradual and incremental ways, and thereby reflects the proper manner of acquiring wisdom, then we have further reason to appreciate a polycentric conception in which law derives from non-state sources as well.

Polycentrism and the Role of the State

The final biblical-theological theme considered above concerned the state. I observed that the Noahic covenant commissioned the human race to pursue justice but did not itself establish civil government. Instead, civil governments have emerged in the course of history as human beings have formed a variety of institutions and authority structures in carrying out the Noahic commission. Thus, I argued that the state remains linked to and dependent upon this larger process, and that the state has no authority to define justice autonomously, but only to enforce a justice whose reality transcends the state and serves the good of the people. Understanding the state along these biblical-theological lines, I argue, reveals additional virtues of polycentrism.

It may be helpful to consider this issue in slightly different terms. To say that the state ought not to define justice autonomously, but enforce a justice whose reality transcends it, is similar to saying that we seek the rule of law, not "the rule of man." Of course, this maxim cannot mean that law exists apart from human action, for law is always a human product. What the maxim envisions is that no individual or group of people are sovereign, but that everyone is accountable to a legal authority independent of his or her own will. Along similar lines, state officials are to be ministers of the law rather than lords of the law.

From this perspective, a monocentric view of law has clear limitations. By making state officials the sole source of law, monocentrism permits a relatively small number of people to define what the law is—which looks rather like the "rule of man." Western societies have tried to mitigate this difficulty through several devices, such as holding legislatures accountable through regular democratic elections, the separation of legislative, judicial, and executive powers, and written constitutions.

108 See Scott, *Seeing Like a State*, 34–35. In comparison, Scott says that changing codes to reflect evolving social practice is "a jerky and mechanical adaptation."

109 On the analogy to language, see Ellickson, *Order without Law*, 5; Fuller, *Principles of Social Order*, 240; Scott, *Seeing Like a State*, 143, 256, 357; Leoni, *Freedom and the Law*, 9, 86, 130, 132, 135–36, 143, 146. On the analogy to markets, see Ellickson, *Order without Law*, 5; Benson, *The Enterprise of Law*, 15; Leoni, *Freedom and the Law*, 22, 86–87, 108–9, 130, 132, 146, 150. On the analogy to science, see Leoni, *Freedom and the Law*, 147–49.

110 For comments on how the traditional common law system captured some of the concerns expressed here, see Barnett, *The Structure of Liberty*, 117; Leoni, *Freedom and the Law*, 179; Ruben Alvarado, *Common Law and Natural Rights: The Question of Conservative Foundations* (Aalten: WordBridge Publishing, 2009), 40.

These initiatives have yielded some obvious benefits, at least in comparison with autocratic alternatives, but they primarily just shift around law-defining power among state officials, rather than make the law more fundamental than the state.[111]

Recognizing non-state sources as law, particularly as embodied in the customary order, seems to address this problem more satisfactorily.[112] The customary order, while still inevitably a human product, is not ultimately the product of human will.[113] Generally speaking, the customary order did not emerge through one person or group imposing its will upon the rest of society. While legislation creates law by an act of will under threat of force, the customary order creates law spontaneously, through the reciprocal and collaborative interaction of innumerable individuals and associations over the broad range of human endeavor.[114] Some people have more influence than others upon development of the customary order, to be sure, but no individual or association has the power to control it. The habits, sentiments, language, technologies, and innovative ideas that shape the customary order do so because they have won assent (perhaps imperceptibly) among the people broadly, not because an individual or a particular group of people has decreed it. Polycentrists often emphasize that while legislation makes law by imposing the will of one upon the many, that is, by coercion, the customary order makes law by consent.[115] It must be admitted that this contrast between legislative coercion and customary consent needs considerable nuance, since customs can be disadvantageous or even downright unjust for minority groups, who may adhere to customary practices less out of consent than out of fear.[116] Yet there is a real distinction between law decreed through legislation and law emerging through customary development. The former requires only some kind of majority vote, often succeeding as one slightly larger faction gains adversarial victory over another slightly smaller faction, while the latter requires people of different background and opinion to discover common ways of doing things through reciprocal collaboration.[117]

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111 In the English legal tradition, the tension between commitment to the rule of law and commitment to Parliamentary sovereignty illustrates the problem. See, for example, Daniel Hannan, *Inventing Freedom: How the English-Speaking Peoples Made the Modern World* (New York: Broadside Books, 2013). Already on page four he speaks of these two ideas as if they are fully compatible. First: "the rule of law. The government of the day doesn't get to set the rules." Then less than half a page later: "representative government. Laws should not be passed, nor taxes levied, except by elected legislators." Does government set the rules or not? Hayek confronts the problem directly when he declares that constitutional separation of powers has failed in its objective. See Hayek, *Rules and Order*, 1.

112 I mention a few pertinent comments from polycentrists: Berman, *Law and Revolution*, 38 ("The view that law transcends politics—the view that at any given moment, or at least in its historical development, law is distinct from the state—seems to have yielded increasingly to the view that law is at all times basically an instrument of the state, that is, a means of effectuating the will of those who exercise political authority."); Pound, *The Ideal Element*, 352 ("Law is the real foe of absolutism."); Bertrand de Jouvenal, *On Power: The Natural History of Its Growth*, trans. J. F. Huntington (1948; Indianapolis: Liberty Fund, 1993), 334 ("Beyond all question, the supremacy of law should be the great and central theme of all political science. But, make no mistake about it, the necessary condition of this supremacy is the existence of a law older than the state, to which it is mentor. For if law is anything which Power elaborates, how can it ever be to it a hindrance, a guide, or a judge?").

113 See Hayek, *Rules and Order*, 28; Murphy, *The Philosophy of Customary Law*, ix, 10, 23, 27, 36, 40.

114 On the importance of reciprocity for customary law, see Benson, *The Enterprise of Law*, 12–13; Fuller, *Principles of Social Order*, 194.

115 See, for example, Benson, *The Enterprise of Law*, 12, 45, 322; Hasnas, "The Obviousness of Anarchy," 116; Leoni, *Freedom and the Law*, 13, 100–10, 131, 146; see also Stoner, *Common-Law Liberty*, 5.

116 For helpful discussion, see Murphy, *The Philosophy of Customary Law*, 51–52, 98–101. On the related debate whether customary law promotes or hinders human freedom, see Murphy, *The Philosophy of Customary Law*, xii; Bederman, *Custom as a Source of Law*, 176.

117 On the danger of the politicization of society and law-creation and the benefits of customary law in restraining it, see, for example, Stoner, *Common-Law Liberty*, 16; Jouvenal, *On Power*, 341; Anthony de Jasay, *Before*

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Societies presumably must make some collective decisions by majority legislative vote. But if we aspire to the ideal of the rule of law, it seems wise to allow the law broad range to develop through evolution of the customary order. And this provides additional reason to appreciate polycentrism.

CASES OF CONFLICT

Some writers have critiqued anarchic-leaning polycentrists by identifying social goods that non-state legal sources allegedly cannot provide.[118] Since I am not questioning the need for civil government, I need not address such critiques.[119] More challenging questions about polycentrism arise from the potential conflicts it creates between state and non-state sources of law. It is one thing to look to the customary order to regulate areas not addressed by state sources or to provide social context for interpreting these sources. But what should be regarded as law when aspects of the customary order contradict pieces of legislation or court decisions, as in the ranching communities chronicled by Ellickson and described in my introduction?

There is surely no easy formulaic solution. Customs and state sources alike can wreak evil, and in some circumstances there may be compelling reasons to prefer the former and in other circumstances the latter. Declaring that one must always trump the other will not guarantee justice. Proponents of polycentrism, therefore, do need to provide some nuanced criteria for making these judgments in particular cases. It is beyond the scope of this article to develop such criteria in detail, but I offer two general considerations that arise from the theological perspective advanced above.

First, one occasion in which state sources seem to deserve preference to the customary order is when elements of a community have not genuinely participated in the processes that produced the pertinent custom but have submitted to it because of coercion or intimidation by those more powerful.[120] In previous sections I have emphasized that bearing God's image is a universal human gift and thus that each person should have a share in its divine commission; I also argued that law best develops in accord with wisdom when the many, rather than a few, participate in its formation and change. Thus, many of the most important reasons for appreciating polycentrism are lost when aspects of the customary order depend upon excluding certain people—such as those identified with a particular racial group, to use an obvious example—from full participation in the community's life. If legislation or other state sources aim to overturn such aspects of the customary order, there is good reason to acknowledge the former as law rather than the latter.

Resorting to Politics, The Shaftesbury Papers, 5 (Cheltenham & Brookfield: Edward Elgar Publishers, 1996), 54–55; Benson, *The Enterprise of Law*, 77, 88.

118 See, for example, William M. Landes and Richard A. Posner, "Adjudication as a Private Good," *Journal of Legal Studies* 8, no. 2 (1979): 235–84; John K. Palchak and Stanley T. Leung, "No State Required? A Critical Review of the Polycentric Legal Order," *Gonzaga Law Review* 38, no. 2 (2002/03): 289–333, at 315–16. For critical comments on the polycentric theories of Hayek, Barnett, and Cover (respectively) on moral grounds, see A. I. Ogus, "Law and Spontaneous Order: Hayek's Contribution to Legal Theory," *Journal of Law and Society* 16, no. 4 (1989): 393–409, at 403–5; Palchak and Leung, "No State Required?," 309; Synder, "Nomos, Narrative, and Adjudication," 1726.

119 Among polycentrists who have addressed them, see Benson, *The Enterprise of Law*, chapters 11–12; Barnett, *The Structure of Liberty*, chapters 13–14; Friedman, *The Machinery of Freedom*, 156–59.

120 With some analogous concerns, Ellickson discusses situations in which the customary order creates parochial norms that work to the detriment of outsiders, which legislation may be suited to fix. See *Order without Law*, 169, 249–50.

Second, when developing criteria for evaluating competing state and non-state sources of law, those sympathetic to the arguments above may wish to distinguish, on the one hand, circumstances in which the customary order has come to contradict older state sources from, on the other hand, circumstances in which newer state sources have been enacted to overturn aspects of the customary order deemed harmful or undesirable. In the latter case, it probably makes most sense to regard the state source as law (other things being equal). A new piece of legislation (or the like) may not in fact improve upon the custom it aims to overturn, but if a community establishes legislative processes, it presumably does so to identify deficiencies in present states of affairs and to seek remedies. Thus, these processes generally deserve deference when they seek to carry out this purpose.

In the former case, however, my previous arguments provide reasons to regard the customary order as law (other things being equal). Among other rationales for acknowledging that the law derives in part from non-state sources incorporated into the customary order, I argued that these non-state sources are able to account for a broad range of relevant information necessary for developing law wisely and that they ensure that ordinary people know what the law is and can plan for the future accordingly. These considerations seem to have special bearing when older state sources fall out of use. As societies change, new circumstances may render older laws problematic, and people's expectations of their neighbors and investments may take new shape. In these circumstances too, of course, evolution of the customary order is not necessarily for the better. But in comparison to outdated state sources, the customary order is immensely better positioned to access dispersed information and to account for common expectations.[121]

CONCLUSION

Amidst various works evaluating legal polycentrism in recent decades, no writer has approached the issue from a Christian theological basis. Filling this gap, I have argued, from important biblical-theological considerations, that polycentrism is a more satisfactory view of law than a monocentrist conception. Although my case leaves open for debate many questions about how a polycentric legal system should work in practice, including how to resolve competing claims among state and non-state sources of law, I contend that it adds substantive weight to the more familiar arguments for polycentrism and should make polycentrism (even) more attractive to Christians—and perhaps to other morally thoughtful people as well.

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121 See discussion of situations in which statutes fall into desuetude due to customary practice throughout Bederman, *Custom as a Source of Law*; Murphy, *The Philosophy of Customary Law*.